

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs May 12, 2009

IN RE MALICHI C.

Appeal from the Juvenile Court for Carter County
No. J-26561; J-26414 John W. Walton, Judge

No. E2009-00055-COA-R3-PT - FILED OCTOBER 13, 2009

This appeal concerns the termination of parental rights. Amanda Griffith and Charles Griffith (“the Griffiths”) filed a Petition seeking to terminate the parental rights of Audrey C. (“Mother”) and Noah C. (“Father”), to the minor child, Malichi C.¹ After conducting a hearing, the trial court entered an order terminating Mother’s parental rights because of severe child abuse, abandonment by willful failure to pay child support, and the best interest of the child. Mother appeals.² We affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Juvenile Court
Affirmed; Case Remanded

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Kathryn J. Dugger-Edwards, Elizabethton, Tennessee, for the Appellant, Audrey C.

Jerry J. Fabus, Gray, Tennessee, for the Appellees, Amanda Griffith and Charles Griffith.

OPINION

I. BACKGROUND

The record shows that Malichi C. (“the child”) was born on October 14, 2004, when Mother was fifteen. Mother and the child entered State custody in December 2006 after their caretaker, Mother’s grandmother, was placed in a nursing home leaving them homeless. Mother and the child began living with the Griffiths on April 26, 2007, and officially entered the Griffiths’ custody on

¹The first name and last name initial of the parents and the minor child will be used to protect the child’s anonymity.

²Although not subject to this appeal, Father’s parental rights were terminated on the grounds of abandonment by willful failure to pay child support.

May 24, 2007. Mother lived with the Griffiths until her 18th birthday in June 2007, and she left the child in the care of the Griffiths.

On February 29, 2008, Mother filed a petition requesting to regain custody of the child (Case No. J-26414). The Griffiths filed the Petition to Terminate Parental Rights on April 21, 2008 (Case No. J-26561). The Petition to Terminate Parental Rights originally alleged abandonment by failure to support, abandonment by failure to visit, persistence of conditions and severe child abuse. At trial, the Griffiths orally dismissed the grounds of abandonment by failure to visit and persistence of conditions, but went forward with their allegations of severe child abuse, failure to support, and best interest of the child.

Several witnesses testified at trial including Janet Martin, a retired school teacher and the child's great aunt, who testified that she observed the child simulating sexual acts on two occasions. The first act occurred when the child began rubbing himself up against a grocery cart in a grocery store while he was riding down the aisle. The second act occurred when she and Mrs. Griffith were baking a cake for the child's third birthday at Ms. Martin's house. When she went into the bedroom to check on the child, she testified that "he was kind of on the side of the bed humping the bed, you know, like again in a sex act and I just thought that was quite unusual for that age child" Ms. Martin indicated that she held an occupation childcare certification, taught school for 32 years, and worked in daycare.

Sandra Range, who is also a retired teacher and the roommate of Ms. Martin, corroborated Ms. Martin's testimony. While Mrs. Griffith and Ms. Martin were baking the child's birthday cake, Ms. Range played with Malichi C. in the bedroom. Ms. Range explained that, at first, Malichi C. was playing with his train set normally on the bed. She then testified:

It's just the mattress and springs and he kind of rubbed against that and when he did, he b[e]gan to, for lack of a better word, to hump on the end of the bed like a dog. And I hollered at Amanda and I said, "Amanda, what is this?" She said, "Oh, you just never seen him do that?" And I said, "Well, I don't know. I've taught school and I was around a lot of kids and, you know, little boys touch themselves and little boys masturbate, but I've never seen that in a child."

Ms. Range continued:

And then other occasions at times, at least one other occasion I remember in a grocery cart him doing that to the point of being completely lost in these gyrations. And Amanda [Griffith] said at that time, she said, "You know," she said, "I just don't know what to do." I said, "Well, I don't know," but I said, "you need to talk to somebody that does know something about this. This is not normal because he's a little kid."

Deszmer Cole, the child's paternal grandmother, testified that she had also observed the child's alarming behavior. She explained that he sometimes acted aggressively and violently. She further noted that "he will hump on things when there's not been any reason to entice that behavior." Additionally, he would put on inappropriate clothing, such as women's clothing, and he would rub up against it until he obtained an erection. She further stated:

Yes, he will also stick his hand down your shirt and fondle you. He's done that since he's real little. He will try to kiss you on the mouth with an open mouth. It's not like a kiss you would give your grandmother or even your mother. You know, it would be like a kiss-kiss and open your mouth.

Ms. Cole explained that the child exhibited such behavior since he first came to live with the Griffiths when he was two and a half.

Mr. Griffith testified that Mother left his house as a result of her failure to follow the rules that he had set for her. One such rule was that other young men and women were not allowed in the house without permission or when he or his wife were not present. Nevertheless, Mother violated this rule on several occasions. On one occasion, about two or three weeks before Mother's 18th birthday, Mr. Griffith claimed he caught her having sex with a young man while the child was nearby on the floor. He explained that the incident "had a lot to do with [her leaving]" when she turned 18. He also testified that he had never received any child support payments from Mother, and Mother only visited the child three times between her departure in June 2007 and April 2008. However, Mr. Griffith admitted that Mother had done well with showing up for her supervised visitations after the visitation order was entered in April 2008. At one of those visits, he claims that the child went to Mother and said "You touched me dirty. Why did you touch me dirty?" Mr. Griffith also testified about the child's sexual behavior:

He's really – I mean, as soon as his pants are off, if you're going to give him a bath or if he takes his pants off, he's constantly touching himself . . . I mean, he – and it's kind of at the point where you have to make him – pull him away from doing it.

He also explained a specific incident concerning a Superman doll:

It's about his height. About maybe three foot. I was walking up the stairs to tell him goodnight and tuck him in, and he was on top of this Superman doll with his pants down just having his way with it. And, I mean, he was in the act of having sex.

Mr. Griffith also confirmed that the child often tries to perform inappropriate open mouth kisses and consistently attempts to put his hand down women's shirts.

Mr. Griffith further testified about the child's claim that Mother placed her finger up his anus:

He was sitting on the floor and he looked at me, and he said, “Mommy stuck her finger up my butt.” Okay. Now, my first take was, “Buddy, now what are you talking about?” And I said, “Are you talking about Amanda [Griffith]?” He said, “No, mommy Audrey.” At this point I didn’t know what to say to him. I mean, and I said, “Buddy, now what are you talking about?” He said, “Mommy Audrey stuck her finger up my butt.” And that was the first time I ever heard it. I mean, and – it took me completely to the floor. I was in total shock. I didn’t – at first you want to think, you know, that this couldn’t happen. But he was more adamant about it every day. He had – just very vocal about it.”

Mr. Griffith reiterated that the child continued to repeat the claim. Mr. Griffith further testified that when the child first came to live with them, he had a very limited vocabulary including few words such as “dada,” “mama,” and “dwink.” He further explained that he allows the child to watch SpongeBob Squarepants, Spiderman, and Batman cartoons, as well as the Ironman movie. He also admitted that neither he nor Mrs. Griffith ever contacted the Department of Children’s Services (“DCS”) about the child’s sexual problems.

Suzanne Augustine, a mental health therapist, testified that she diagnosed the child with post traumatic stress disorder (“PTSD”) and sexual abuse. She stated that she holds a Master’s Degree in Educational Psychology and Counselor Education from Tennessee Technological University and has been a mental health therapist with Bristol Regional Counseling Center since 2001. She admitted that she is not currently licenced in Tennessee because it is not required for her job. She claimed to have testified 46 times in an assortment of child custody, child placement, child abuse and visitation cases. She further asserted that she had been qualified as an expert witness by the various courts on each of those occasions.

Ms. Augustine testified that she based her diagnosis of PTSD on several symptoms, including anger, flashbacks, unrealistic fears even for a three-year-old, compulsive behavior, and apprehension at being taken away from Mrs. Griffith. She also noted that the child has violent tendencies and cannot be around any sort of toy weapons such as plastic swords. When asked about his compulsive masturbation, she stated:

That’s very abnormal. His intense interest in the adult female body is very abnormal. It’s normal for a three, four, year old boy to be interested in seeing another little same age girl or even another boy his age. What’s abnormal is when he shows an interest in an adult or if a child who’s about, oh, on up there, ten years old or whatever, is showing an interest in a three-year old child, that is when it becomes abnormal.

Ms. Augustine’s assessment was based on 23 visits with the child, 11 of which were one-on-one sessions.

Ms. Augustine further indicated that the child told her on several occasions that Mother “stuck her finger up his bottom and it hurt him and that he thinks she’s mean.” Ms. Augustine

elaborated that the child claimed Mother was mean to him; according to her notes, the child asserted that Mother threatened him with monsters and then “took me in the dark by myself. She not come back.” When asked whether these statements could have been coached by the Griffiths, she responded that it was unlikely because the child exhibited none of the signs of coaching. She explained that coached young children tend to blurt out what they have been told to say as soon as they enter a room. The child, on the other hand, usually made the comment midway through the session and appeared sincere in his statement.

She stated that Mrs. Griffith told her that the Griffiths were taking care of the child while DCS decided what to do with him. Ms. Augustine admitted that, based on that statement, she falsely assumed that DCS still had an open investigation into the child’s case. When asked whether she reported the child’s allegations of physical abuse to DCS, she replied that she had not.

Ms. Augustine further discussed the Griffiths’ concerns about the child’s former babysitter, “Ms. Jacqueline.” Ms. Augustine explained that both she and the Griffiths were concerned that Ms. Jacqueline was showing a greater interest in the child than what was appropriate. Ms. Augustine continued:

I think [Ms. Jacqueline] was wanting to become too involved in giving parenting tips and demanding certain time frames. I’m not sure exactly what all, but she was becoming very outspoken in terms of her on child rearing ideas and how the child’s behavior should be handled, those sort of things. She was becoming overbearing, I think, according to what Ms. Griffith had expressed.

Mrs. Griffith testified that it was a mutual decision for Mother to leave the house because Mother was unwilling to follow the rules. Mrs. Griffith corroborated Mr. Griffith’s testimony that Mother had visited the child three times between July 2007 and April 2008.

She further testified that she was told to allow Mother to provide care to Malichi C. while Mother was living with them. After Mother left the Griffiths’ residence, Mrs. Griffith bathed the child for the first time. She explained that she was shocked when she observed the child “hump the floor.” She noted that every time she would bathe the child, he was preoccupied with touching himself. She recalled observing other alarming sexual behavior, including inappropriate kissing, simulating sexual acts on dolls, and fondling of women’s breasts. Mrs. Griffith also claimed that the child told her he hated Mother, that Mother “touched him dirty,” and that “Mother stuck her finger in my butt.”

Mrs. Griffith admitted that originally she was interested in taking in the child only and reluctantly took in Mother. Her reluctance was based on the belief that there was little chance to change Mother’s behavior since she was almost eighteen. However, she insisted that she and Mr. Griffith tried to help Mother as much as they could.

Mrs. Griffith confirmed that the child experienced difficulty communicating when he first arrived at home as a result of his limited vocabulary. She denied that she had directly told Ms. Augustine that DCS had an active case file on the child, opining that Ms. Augustine must have mistakenly assumed such involvement of the agency because of the surrounding circumstances.

During Mother's testimony, she strongly denied that she ever touched the child inappropriately and asserted that she was a good mother. She further explained that the child makes up lies whenever he wants attention. Mother alleged that Mr. Griffith's claim that he caught her having sex with a young man on the couch was a lie. While she acknowledged that she broke the rules by having the young man over without permission, she claimed that Mr. Griffith only saw them kissing. Mother also denied ever having had sex in front of the child and stated "I don't understand what kind of parent would have sex in front of their child." She admitted that when the child was young he would attempt to put his hand down her shirt. However, she claims that she explained to him that such behavior was inappropriate.

Regarding child support, Mother testified that she understood what child support was. She alleged, however, that she (1) was never ordered to pay it, and (2) was unable to pay it because she was pregnant the four months before the filing of the Petition. Because the Petition was filed on April 21, 2008, the four months preceding began on December 21, 2007. Mother claimed she became pregnant around December 15, 2007, and that her doctor advised her not to work due to complications with the pregnancy.³ When asked on cross examination why she stated in her Petition for Increased Visitation that she had a steady, well paying job, Mother explained that when her Petition was filed, she had quit a job at Domino's Pizza and had begun working at Hardee's. The following exchange then occurred:

- Q: You've worked some while you were pregnant?
A: I've worked like a total of maybe two weeks while I was pregnant and that's whenever the doctor said that it was a high risk pregnancy and I had morning sickness.
Q: But you got pregnant in December and you were still working in February so at least a couple of months you worked while you were pregnant?
A: Yeah.

When asked about drug use, Mother testified that she previously used drugs, but not since the birth of Malichi C. She admitted she was on probation for possession of marijuana, but asserted that she was innocent of the offense and was merely in the wrong place at the wrong time.

By clear and convincing evidence, the trial court held that Mother had abandoned the child by willfully failing to pay child support during the four months preceding the filing of the Petition to Terminate Parental Rights. The trial court further found that Mother committed severe child abuse as defined by Tenn. Code Ann. § 36-1-113(g)(4) and § 37-1-102(b)(21), and that the

³The child was eventually born with cystic fibrosis.

termination of parental rights was in the best interest of the child. The trial court also denied Mother's Petition for Custody and Motion for Increased Visitation. Mother filed a timely notice of appeal.

II. ISSUES

The issues for review are restated as follows:

- A. Whether the trial court erred in qualifying Ms. Augustine as an expert within the meaning of Tenn. Code Ann. § 37-1-102(b)(21)(B).
- B. Whether the trial court erred in admitting evidence that the child suffered from PTSD to prove sexual abuse?
- C. Whether the trial court erred in admitting hearsay statements of the child.
- D. Whether the trial court erred in holding that the Griffiths proved severe child abuse by clear and convincing evidence.
- E. Whether the trial court erred in denying Mother's Motion to Dismiss on the issues of (1) severe child abuse and (2) abandonment by failure to pay child support.
- F. Whether the trial court erred in finding that Mother's pregnancy did not excuse her failure to pay child support.
- G. Whether the trial court erred in holding that Mother failed to prove that she is entitled to have custody of or greater visitation time with the child by a preponderance of the evidence.

III. STANDARD OF REVIEW

A biological parent's right to the care and custody of his or her child is among the oldest of the judicially recognized liberty interest protected by the Due Process Clauses of the Federal and State constitutions. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Hawk v. Hawk*, 855 S.W.2d 573, 578-579 (Tenn. 1993); *Ray v. Ray*, 83 S.W.3d 726, 731 (Tenn. Ct. App. 2001). While this right is fundamental, it is not absolute. *State v. C.H.K.*, 154 S.W.3d 586, 589 (Tenn. Ct. App. 2004). It continues without interruption only so long as a parent has not relinquished it, abandoned it, or engaged in conduct requiring its limitation or termination. *Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002); *In re S.M.*, 149 S.W.3d 632, 638-39 (Tenn. Ct. App. 2004); *In re M.J.B.*, 140 S.W.3d 643, 652-53 (Tenn. Ct. App. 2004).

In Tennessee, termination proceedings are governed by statute. Parties who have standing to seek the termination of a biological parent's parental rights must prove two things. First, they must prove the existence of at least one of the statutory grounds for termination found in Tenn. Code Ann. § 36-1-113(g) (Supp. 2008) by clear and convincing evidence. *See* Tenn. Code Ann. § 36-1-113(c)(1); *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002). Second, they must prove that terminating the biological parent's parental rights is in the child's best interest as described in Tenn. Code Ann. § 36-1-113(I). Tenn. Code Ann. § 36-1-113(c)(2); *In re A.W.*, 114 S.W.3d 541, 545 (Tenn. Ct. App. 2003); *In re C.W.W.*, 37 S.W.3d 467, 475-76 (Tenn. Ct. App. 2000); *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998).

No civil action carries with it graver consequences than a petition to sever family ties irretrievably and forever. *M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996); *In re Knott*, 197 S.W. 1097, 1098 (Tenn. 1917). Because the stakes are so profoundly high, Tenn. Code Ann. § 36-1-113(c)(1) requires persons seeking to terminate a biological parent's parental rights to prove the statutory grounds for termination by clear and convincing evidence. *In re A.W.*, 114 S.W.3d at 544; *In re M.W.A., Jr.*, 980 S.W.2d at 622. This heightened burden of proof minimizes the risk of erroneous decisions. *Id.* Evidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable, *In re Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005), and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence. *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002); *In re S.M.*, 149 S.W.3d at 639; *In re J.J.C.*, 148 S.W.3d 919, 925 (Tenn. Ct. App. 2004). It produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established. *In re A.D.A.*, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002); *Ray v. Ray*, 83 S.W.3d at 733.

The findings of fact of a trial court are reviewed *de novo* upon the record with a presumption of correctness. Tenn. R. App. P. 13(d). However, the heightened burden of proof in these types of cases demands further inquiry. We must determine "whether the trial court's findings, made under a clear and convincing standard, are supported by a preponderance of the evidence." *In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006). If the trial court has not made a specific finding of fact on a particular matter, the facts in the record will be reviewed purely *de novo*. *In re Valentine*, 79 S.W.3d at 546. All issues of law are reviewed *de novo* with no presumption of correctness. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993).

IV. DISCUSSION

A.

Mother argues that the trial court erred in qualifying Ms. Augustine as an expert witness, and therefore, she should not have offered an opinion on the issue of severe child abuse. Mother quotes

the language of Tenn. Code Ann. § 37-1-102(b)(21)(B) (Supp. 2008),⁴ which defines severe child abuse as:

Specific brutality, abuse or neglect towards a child that **in the opinion of qualified experts** has caused or will reasonably be expected to produce severe psychosis, severe neurotic disorder, severe depression, severe developmental delay or retardation, or severe impairment of the child's ability to function adequately in the child's environment, and the knowing failure to protect a child from such conduct.

Id. (emphasis added).

Mother contends that Ms. Augustine is unqualified to diagnose any of the above factors because she is not licensed by the State. Mother also argues that even if Ms. Augustine was a licensed therapist, she would still be unable to render an opinion on mental illness under Tenn. Code Ann. § 63-22-115(g) (Supp. 2004), which provides that “[n]othing in this section permits any person certified or licensed as a marital and family therapist to perform psychological testing intended to measure and/or diagnose mental illness.” Lastly, Mother asserts that Ms. Augustine's testimony was based on faulty underlying data and therefore violates Rule 703 of the Tennessee Rules of Evidence (“Rule 703”). Rule 703 states: “The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.” Tenn. R. Evid. 703.

According to Mother, the faulty underlying facts included: (1) Ms. Augustine's false assumption that DCS was actively investigating alleged child abuse by Mother and that the Griffiths were only in temporary custody; (2) Ms. Augustine's failure to report the suspected child abuse; and (3) a lack of corroborating evidence to support Ms. Augustine's opinion.

The Griffiths respond by pointing out that the court has previously held in *State v. Robbins*, No. W2004-00487-COA-R3PT, 2004 WL 2715334, at *6 (Tenn. Ct. App. W.S., Nov. 18 2004), that a counselor who has extensive experience treating sexually abused children is qualified to render an expert opinion even if he or she is not licensed by the State. In *Robbins*, the court explained:

It is clear from the record that Ms. Shanklin had substantial professional experience both diagnosing and treating children who had been sexually, emotionally and physically abused. **The fact that she was not a licensed counselor is immaterial to whether she was qualified to render an expert opinion in this matter.** Ms. Robbins has directed us to no case law, nor have we found any, that provides authority for her view that an unlicensed counselor is, as a matter of law, incompetent to render expert testimony.

Id. (emphasis added).

⁴Effective July 1, 2009, “Severe child abuse” is defined at subsection (23) instead of (21). For purposes of this opinion, we will use the citation in effect at the time of the events and trial.

The Griffiths further point out that questions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the trial court. *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 263-264 (Tenn. 1997). To assist the trier of fact in this “gatekeeping” function, Rule 702 of the Tennessee Rules of Evidence permits an expert to testify “in the form of an opinion or otherwise,” only where the “scientific, technical, or other specialized knowledge” offered by the witness will substantially assist the trier of fact. Tenn. R. Evid. 702. Rule 703 requires an expert’s opinion to be supported by trustworthy facts or data “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.” Tenn. R. Evid. 703. The determinative factor is “whether the witness’s qualifications authorize him or her to give an informed opinion on the subject at issue.” *State v. Stevens*, 78 S.W.3d 817, 834 (Tenn. 2002). Significantly, a trial court’s ruling on the admissibility of such evidence may be overturned on appeal only if the discretion is exercised arbitrarily or is abused. *Id.* at 832.

After reviewing the record, we hold that the trial court did not err in qualifying witness Suzanne Augustine as an expert. Similar to our holding in *Robbins*, whether Ms. Augustine was licensed by the State is immaterial if she has substantial professional experience in diagnosing and treating children who had been sexually, emotionally and physically abused. Ms. Augustine testified that she has been a mental health therapist with Bristol Regional Counseling Center since 2001. She holds a Master’s Degree in Educational Psychology and Counselor Education from Tennessee Technological University, and she has testified extensively in various child custody, child placement, child abuse and visitation cases. Further, Ms. Augustine testified that she was qualified as an expert witness by various courts on each of those occasions. The trial court credited her testimony determining that Ms. Augustine’s experience qualified her as an expert, and we agree.

We also find no merit in Mother’s assertion that Ms. Augustine’s testimony was based on untrustworthy underlying data. Ms. Augustine’s testimony clearly showed that she based her opinions on the interactions and conversations she had with the child during the 23 visits. Thus, Mother’s contention that there is a lack of corroborating evidence to support Ms. Augustine’s opinion is misplaced. Even if Ms. Augustine was under the false assumption that DCS was actively investigating the child’s situation, Mother has failed to show that such an assumption inappropriately skewed Ms. Augustine’s diagnosis. Finally, we disagree that Ms. Augustine’s failure to report the suspected child abuse had any bearing on her ultimate diagnosis. In short, Mother has failed to put forth sufficient evidence that the trial court abused its discretion under Rule 703.

B.

Mother also contends that the trial court erred in admitting evidence that the child suffered from PTSD to prove sexual abuse. She argues that the child’s PTSD does not necessarily mean that he was sexually abused, and instead she posits that the PTSD could be the result of movies and TV shows that the Griffiths allowed the child to watch. Mother further points out that Tennessee courts have previously held that expert testimony concerning the symptoms of PTSD cannot be used to prove sexual abuse. *Dept. of Children’s Services v. M.S.*, No. M2003-01670-COA-R3-CV, 2005

WL 549141, at *21-22 (Tenn. Ct. App. M.S., March 8, 2005) (discussing *State v. Ballard*, 855 S.W.2d 557 (Tenn. 1993)).

The Griffiths counter that the diagnosis of PTSD was not used to prove sexual abuse, but it was instead offered as direct evidence to prove that the child suffered from “severe impairment of the child’s ability to function adequately in the child’s environment” as required by Tenn. Code Ann. § 37-1-102(b)(21)(B).

We believe that Mother has confused the distinct concept of “severe child abuse” as defined by § 37-1-102(b)(21)(B) with that of “sexual abuse.” The trial court’s Final Order does not rely on sexual abuse as one of its grounds for terminating Mother’s parental rights. Instead, the trial court determined that Mother had violated Tenn. Code Ann. § 37-1-102(b)(21)(B) based on a finding of PTSD, not sexual abuse. Accordingly, Mother’s argument is without merit because the trial court did not use the child’s PTSD to prove sexual abuse.

C.

Mother further asserts that the trial court erred in admitting hearsay statements of the child. Specifically, the court admitted the child’s allegation that his Mother stuck her finger up his anus. Mother contends that Ms. Augustine’s and Mr. Griffith’s testimony concerning those statements is unreliable because the accusation was not made until many months after the alleged act occurred. The child made the initial statements between six and eight months after Mother left the Griffiths’ home in June 2007. As a result, Mother asserts that the child’s allegation lacks trustworthiness because a three-year-old child cannot remember what happened within the previous six to eight months. According to Mother, Mr. Griffith’s recollection is self-serving and unreliable. Additionally, she contends that the information provided by the Griffiths to Ms. Augustine resulted in a biased diagnosis of the child because the information was misleading, i.e., the inference that the child was the subject of a DCS investigation.

The Griffiths respond that witnesses Ms. Martin, Ms. Range, and Ms. Cole all testified they had observed the child perform sexually inappropriate acts. Mrs. Griffith testified that the child had told her that Mother “touched him dirty,” and the child repeatedly alleged that Mother had “stuck her finger up his butt.” The Griffiths argue that the trial court found Mr. Griffith and Ms. Augustine’s testimony to be credible, and that this court may not reverse that decision unless there is clear evidence to the contrary. *In re. R.M.S.*, 223 S.W.3d 240, 265 (Tenn. Ct. App. 2006).

Rule 803(25) of the Tennessee Rules of Evidence is the hearsay exception applicable to statements of children who are alleged victims of child abuse in a termination of parental rights case. An alleged child victim’s statements are exempt from the general hearsay rule. The Rule provides in pertinent part, as follows:

Provided that the circumstances indicate trustworthiness, statements about abuse or neglect made by a child alleged to be the victim of physical, sexual, or psychological abuse or neglect, offered in a civil action concerning issues of dependency and neglect pursuant to Tenn. Code Ann. § 37-1-102(b)(12), issues concerning severe child abuse pursuant to Tenn. Code Ann. § 37-1-102(b)(21), or issues concerning termination of parental rights pursuant to Tenn. Code Ann. § 37-1-147 and Tenn. Code Ann. § 36-1-113, and statements about abuse or neglect made by a child alleged to be the victim of physical, sexual, or psychological abuse offered in a civil trial relating to custody, shared parenting, or visitation.

Tenn. R. Evid. 803(25) (2008). The Advisory Commission Comment states, *inter alia*:

Declarations under this hearsay exception are inadmissible if “circumstances indicate lack of trustworthiness.” Courts should carefully consider the motivation of particular minor declarants and also the motivation of some adults to influence children. Also worthy of consideration is the presence or absence of evidence corroborating the hearsay statement. As with all hearsay offered at trial, balancing under Rule 403 is appropriate. _____

Tenn. R. Evid. 803(25) Advisory Commission Comment.

We do not believe that the child’s statement indicates a lack of trustworthiness considering the above hearsay exception and the corresponding Advisory Commission Comment. As an initial matter, the child’s statements are consistent with his general behavior. The testimony of Ms. Martin, Ms. Range, and Ms. Cole concerning the child’s inappropriate sexual behavior certainly suggests that he has experienced some form of trauma.

_____ More importantly, the trial court found Ms. Augustine and her testimony to be credible. Ms. Augustine gave extensive testimony where she concluded that the child did not receive coaching from anyone concerning his accusation that Mother inserted her finger into his anus. Specifically, she testified:

This child has not been coached in terms of what he has said to me. He has too many other signs, symptoms of sexual abuse and he had - my office is in Bristol which is 45 minutes away, and I have become pretty good at telling when a child is coached. One way you can tell is the child will come in immediately and blurt out whatever they are told to say, and . . . their facial expression, their body language is not congruent with what they are telling you. And number one, a three year old will not remember for that length of the drive and even if his aunt had coached him right outside my office, they usually blurted it out to get that part over with so they can play. [Malichi C.], usually any revelations that he had for me were usually mid-session and just fleeting comments. So, you know, I do feel they were very sincere, and also it was the same thing week after week after week.

It is true that Ms. Augustine admitted that she incorrectly assumed the child was under a DCS investigation. Nevertheless, in our opinion, this assumption is insufficient to undermine her entire diagnosis, and it certainly falls short of the “clear evidence” required to discredit her conclusion as to whether the child’s accusation was genuine. Similarly, the trial court credited the testimony of Mr. Griffith. While his testimony may be self-serving, that alone does not rise to the level of “clear evidence” of unreliability. The trial court was in a much better position to assess Ms. Augustine’s credibility, and we will not disturb the trial court’s determination on this point. Therefore, we hold that the trial court acted within its discretion in allowing the hearsay testimony of the child pursuant to Tenn. R. Evid. 803(25).

D.

Mother contends that the trial court erred in holding that the Griffiths proved severe child abuse by clear and convincing evidence. The trial court determined that Mother’s abuse of the child clearly and convincingly caused the child’s PTSD and impaired his ability to adequately function. Severe child abuse is a statutorily defined ground for termination of parental rights.

Tenn. Code Ann. § 36-1-113(g)(4) (Supp. 2008) states, in pertinent part:

The parent or guardian has been found to have committed severe child abuse as defined in § 37-1-102, under any prior order of a court or is found by the court hearing the petition to terminate parental rights or the petition for adoption to have committed severe child abuse against the child who is the subject of the petition or against any sibling or half-sibling of such child, or any other child residing temporarily or permanently in the home of such parent or guardian[.]

Id. (emphasis added). Under Tenn. Code Ann. § 37-1-102(b)(23)(B), severe child abuse means:

Specific brutality, abuse or neglect towards a child **that in the opinion of qualified experts** has caused or will reasonably be expected to produce severe psychosis, severe neurotic disorder, severe depression, severe developmental delay or retardation, or **severe impairment of the child's ability to function adequately in the child's environment**, and the knowing failure to protect a child from such conduct[.]

Id. (emphasis added).

Mother challenges the trial court’s finding of severe abuse for several reasons. First, she contends that Ms. Range’s testimony that the child was acting out sexually has no connection to Mother’s actions. Second, there were no allegations that the child’s actions were related to the incident where Mr. Griffith allegedly found Mother having sex in front of the child. Third, Mother claims that Ms. Augustine was unqualified as an expert and her diagnosis was based on faulty

information. Fourth, the child's former babysitter, Ms. Jacqueline, may have caused the child's behavioral problems instead of Mother. Lastly, Mother asserts that the Griffiths may have coached the child by teaching him specific words and phrases like "stick up my butt" during the eight months after Mother's departure from the Griffiths' house.

In response, the Griffiths contend that the trial court correctly found that Mother's abuse caused the child's PTSD, which impairs his ability to adequately function in his environment. The trial court's findings are supported by a great deal of evidence that includes the testimony of Ms. Martin, Ms. Range, Ms. Cole, and the Griffiths, all describing the child's inappropriate sexual behavior. The Griffiths also highlight Ms. Augustine's extensive testimony where she explains her PTSD diagnosis because of the child's multiple symptoms. The child's symptoms consist of anger, flashbacks, unrealistic fears, compulsive behavior, compulsive masturbation, violent tendencies, and apprehension of being taken away from Mrs. Griffith. Additionally, the Griffiths emphasize that the child independently told three different witnesses - Mr. Griffith, Mrs. Griffith, and Ms. Augustine - that Mother had either inserted her finger into the child's anus or "touched him dirty."

We agree with the Griffiths that the evidence clearly and convincingly shows that the child suffered specific brutality causing PTSD that has impaired his ability to function. This court rejects Mother's arguments that Ms. Augustine is unqualified as an expert, Ms. Augustine's PTSD diagnosis was flawed by faulty underlying data, and the Griffiths coached the child to lie about his Mother. Based on the trial testimony that clearly paints a picture of a troubled boy who is sexually compulsive, fearful, apprehensive, and sometimes violent, this court is convinced that the child was a victim of severe child abuse that impairs his ability to function.

Determining that the child suffered from severe child abuse is only the first step. We must also determine whether the evidence clearly and convincingly shows that Mother was responsible for the abuse as required by Tenn. Code Ann. § 36-1-113(g)(4). We reiterate that under our standard of review, we must review the trial court's finding of each *individual fact* under the preponderance of the evidence standard set out in Tenn. R. App. P. 13(d). Accordingly, we review each finding of fact *de novo* with a presumption of correctness upon the trial court's record unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d). Our duty essentially is to decide "whether the trial court's findings, made under a clear and convincing standard, are supported by a preponderance of the evidence." *See In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006).

The trial court heard opposing testimony concerning whether Mother inserted her finger in to the child's anus. On the one hand, Mother vehemently denied the accusation on the stand. On the other, the trial court heard the testimony of Mr. Griffith who testified about the first time the child told him about the alleged incident. Ms. Augustine further testified that the child told her on multiple occasions that Mother had inserted her finger into his anus, and that, in her professional opinion, the child was being truthful about these statements. Mrs. Griffith also testified that the child had told her that Mother had "touched him dirty." In making its determination whether Mother had inserted her finger into the child's anus, the trial judge also undoubtably relied on his assessment of the credibility of the various witnesses. It is well settled that a trial court's assessment of credibility

is entitled to “great weight” and will not be disturbed unless there is clear evidence to the contrary. *In re R.M.S.*, 223 S.W.3d at 265. Because of the trial court’s assessment of the credibility of the witnesses and the extensive testimony offered, we cannot say that the evidence preponderates against the trial court’s finding of fact that Mother inserted her finger in the child’s anus.

_____ Mother further alleges that the babysitter, Ms. Jacqueline, may have been the one responsible for the child’s behavior. It is true that Ms. Augustine testified at trial that the Griffiths had some concerns that Ms. Jacqueline was becoming overly involved and overbearing. As a result, passing allegations were made by Mother’s counsel that the babysitter may have been responsible for the child’s behavioral problems. Significantly, Ms. Jacqueline never testified, and Mother failed to produce any direct evidence that Ms. Jacqueline was responsible for the child’s behavioral problems. Instead, Mother attempts to rely on Ms. Augustine’s third-hand testimony about the babysitter’s overbearing nature as proof that the babysitter is responsible for the child’s behavioral problems. Such a contention is not proof, but it is instead only an allegation. It is well settled that unsupported allegations are not evidence. *See Holloway v. Evers*, No. M2006-01644-COA-R3-CV, 2007 WL 4322128, at *7 (Tenn. Ct. App. M.S., Dec. 6, 2007). Hence, the preponderance of the evidence does not support Mother’s contention that the babysitter is responsible for the child’s behavior.

We hold that the combined weight of these facts clearly and convincingly shows that Mother committed severe child abuse against the child causing his inability to function. Thus, the Griffiths proved by clear and convincing evidence the ground of severe child abuse pursuant to Tenn. Code Ann. § 36-1-113(g)(4).

Nonetheless, we disagree with the Griffiths’ contention that the trial court held, by clear and convincing evidence, that Mother committed aggravated sexual battery under Tenn. Code Ann. § 39-13-504. Tenn. Code Ann. § 39-13-504(a)(4) (Supp. 2008) provides that when “the victim is less than thirteen (13) years of age,” aggravated sexual battery “is unlawful sexual contact with a victim by the defendant or the defendant by a victim.” *Id.*

The Griffiths are incorrect that the trial court explicitly held by clear and convincing evidence that Mother committed aggravated sexual battery pursuant to the above statute. Nothing in the trial court’s Final Order mentions Tenn. Code Ann. § 39-13-504(a)(4) or even the phrase “aggravated sexual battery.” Furthermore, § 39-13-504 is clear that aggravated sexual battery requires “sexual contact.” Tenn. Code Ann. § 39-13-501(6) (2008) defines “sexual contact” as

“Sexual contact” includes the intentional touching of the victim’s, the defendant’s, or any other person’s intimate parts, or the intentional touching of the clothing covering the immediate area of the victim’s, the defendant’s, or any other person’s intimate parts, **if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification.**

Id. (emphasis added). Although we uphold the trial court’s factual finding that Mother inserted her finger into the child’s anus, there was no finding that it was “for the purpose of sexual arousal or

gratification.” Furthermore, there is nothing in the record that would allow this court to make such a determination.

Consequently, we do not believe there should be any further inquiry into the matter. We have found that Mother committed severe child abuse and violated Tenn. Code Ann. § 37-1-102(b)(21)(B) by clear and convincing evidence. A further finding that she committed severe child abuse by violating § 37-1-102(b)(21)(C) (aggravated sexual assault) would be duplicative, unnecessary, and not in the interests of judicial economy.

E.

Mother claims that the trial court erred in denying her Motion to Dismiss on the issues of (1) severe child abuse and (2) abandonment by failure to pay child support. We have decided already that the trial court was correct in its finding that Mother committed severe child abuse against the child. Therefore, the trial court’s denial of the Motion to Dismiss on that issue was proper..

Regarding the abandonment issue, Mother argues that the Griffiths failed to prove that she did not pay child support for four months prior to the filing of the Petition to Terminate Parental Rights as required by Tenn. Code. Ann. § 36-1-113(g)(1).

The Griffiths respond by pointing to their trial testimony; both Mr. and Mrs. Griffith testified that they never received child support payments from Mother. Mother also testified on the child support issue acknowledging that she understood what child support is and that the Griffiths provided for all of the child’s expenses. Additionally, Mother contradicted her direct testimony during cross-examination. During the direct examination, Mother testified that she became pregnant in December 2007 around the time the Griffiths filed the Petition to Terminate Parental Rights. Mother claimed that she was unable to work since becoming pregnant in December 2007 due to her doctor’s advice. However, on cross examination, she admitted to working through February 2008.

The initiation of termination of parental rights may be based upon statutorily defined grounds, which includes abandonment as a ground. *See* Tenn. Code Ann. §36-1-113(g)(1). Abandonment is defined in Tenn. Code. Ann. § 36-1-102(1)(A)(I) (2005), which states, in pertinent part:

For purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, “abandonment” means that:

For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or

adoption, that the parent(s) or guardian(s) either **have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child[.]**

Id. (emphasis added).

We hold that the trial court did not err in denying Mother's Motion to Dismiss based on abandonment. The Griffiths offered evidence of Mother's non-payment through their undisputed testimony. On the other hand, Mother's testimony was contradictory and evasive. Mother admitted that she never paid child support to the Griffiths and conceded that the Griffiths provided for all of the child's expenses.

Mother attempted to justify her non-payment of child support with her pregnancy. Tenn. Code. Ann. § 36-1-102(1)(A)(I) requires non-payment to be "willful," and Mother claims that her pregnancy kept her from working and providing support for the child. However, Mother's testimony on cross examination undermined the veracity of her excuse for non-payment.

We reiterate that the court affords "great weight" to a trial court's assessment of a witness's credibility. *In re R.M.S.*, 223 S.W.3d at 265. In this case, the trial court did not find Mother's testimony to be credible, and it was justified in so doing. Accordingly, we hold that the Griffiths proved, by clear and convincing evidence, that Mother abandoned the child through her failure to provide child support pursuant to Tenn. Code. Ann. § 36-1-113(g)(1) and Tenn. Code. Ann. § 36-1-102(1)(A)(I). We further hold that the trial court was correct in denying Mother's Motion to Dismiss.

F.

_____Mother additionally asserts that the trial court erred in finding that Mother's pregnancy did not excuse her failure to pay child support. For the reasons explained above, we affirm the trial court's decision that Mother did not have a justifiable excuse for failing to pay for child support.

G.

Mother contends that the trial court erred in holding that she had failed to prove, by a preponderance of the evidence, that she is entitled to have custody of or greater visitation time with the child. For all the reasons stated above, we have affirmed the trial court's termination of Mother's parental rights as to the child. As a result, the issues of Mother regaining custody or increasing her parenting time are moot.

V. CONCLUSION

Therefore, the judgment of the trial court is affirmed in its entirety. Costs on appeal are taxed to the Appellant Audrey C. The case is remanded to the trial court for enforcement of the court's judgment and for collection of costs assessed below, pursuant to applicable law.

JOHN W. McCLARTY, JUDGE